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Supreme Court, U.S.
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No. 95-1085

In The

Supreme Court of the United States

October Term, 1995

JOHN R. PARKER,

Petitioner,

vs.

EVENING POST PUBLISHING CO. AND JIM PARKER,

Respondents.

On Petition For A Writ Of Certiorari To The South Carolina Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is an individual who acquires an ownership interest in the assets of an automobile dealership which is located in a community in which the individual formerly was in the automobile dealership business and, who, while managing the dealership which is the subject of the purchase pending closing of the sale, advertises that he is back in the car business at that dealership's business name a public figure with respect to a claim of libel arising out of a media report of his potential liability for a judgment obtained against the former owners of the dealership assets for fraudulently structuring a straw purchase in the sale of a vehicle to a consumer?

2. In a news article about a judgment obtained against a former automobile dealership for fraudulently structuring a straw purchase in the sale of a vehicle to a consumer, does the media defendant invade the privacy of a private individual who had formerly been in the automobile dealership business in the same community and had subsequently acquired an ownership interest in the assets of the dealership against whom the judgment was obtained and who advertised that he was back in the car business at that dealership's business name while managing the dealership pending closing of the sale when the media defendant reports in the article that the individual may be personally liable for the judgment?

LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the proceeding in the Court below are contained in the caption of this Respondents' Brief in Opposition.

Respondent Evening Post Publishing Co. is a South Carolina corporation which owns a 60% interest of the Buenos Aires Herald, an Argentina Company (the other 40% interest therein being owned by various Argentinean citizens), but Evening Post Publishing Co., as the parent company, does not otherwise have any parent companies or any subsidiaries other than its wholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Evening Post Publishing Co. and Jim Parker, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner, John R. Parker.

OPINIONS BELOW

Respondents adopt the statement of the Opinions Below set forth in the Petition.

JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a). Respondents question the Supreme Court's jurisdiction at I, *infra*.

CONSTITUTIONAL PROVISION AND APPELLATE COURT RULE INVOLVED

U.S. CONST. amend. I

The text of this provision is reproduced in the Appendix to the Petition at Pet.App. p. 6-1.

Rule 220(c), South Carolina Appellate Court Rules

> *Affirmance on Any Ground Appearing in Record.* The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.

COUNTERSTATEMENT OF THE CASE

Respondents submit the following as a counterstatement of the case in order to correct inaccuracies in the STATEMENT OF THE CASE in the petitioner's Petition, including matters stated in said Petition under the separate heading of "STAGE AT WHICH FEDERAL QUESTION WAS RAISED:"

This action was commenced in the Court of Common Pleas for Charleston County, South Carolina, by petitioner, John R. Parker, against respondent Evening Post Publishing Co., publisher of the *News and Courier* newspaper in Charleston, South Carolina, and respondent Jim Parker, a reporter for that paper, upon a Complaint alleging libel and invasion of privacy based upon an article written by respondent Jim Parker published in the *News and Courier* on August 3, 1989. The article concerned the outcome of a lawsuit by Yulonda Adams ("Adams") against Classic Lincoln-Mercury, Inc. ("Classic"), an automobile dealership, over Classic's use of a so-called "straw purchase" in the October, 1987, financing of Adams' vehicle purchase.

On December 13, 1988, petitioner and Jack M. Mills ("Mills") (an individual not a party to this action), entered into an Asset Purchase Agreement with Classic, then doing business as Heritage Lincoln-Mercury, to purchase the assets of Classic (R.pp. 267-269; R.p. 839).[1] At the same time, petitioner entered into a Management

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[1] References to the Record on Appeal before the South Carolina Court of Appeals are designated herein by the letter "R."

Agreement by which he agreed to manage and operate the Heritage dealership pending approval of the sale by the manufacturer and the closing of the sale (R.pp. 274-276; R.p. 867; R.p. 871). Pursuant thereto, petitioner took over the management and operation of the Heritage dealership on December 26, 1988 (R.p. 276).

Petitioner had previously been in the automobile dealership business in Charleston. When he entered upon the operation of Heritage Lincoln-Mercury under the Management Agreement, he ran newspaper and radio ads in his individual name announcing that he was back in the car business at Heritage Lincoln-Mercury (R.pp. 364-365.)

On March 13, 1989, a corporation named Parker Lincoln-Mercury, Inc. was organized for the purpose of taking over and operating the dealership upon the closing of the purchase (R.pp. 422-423; R.p. 937). Mills held 85% of the stock of that corporation and petitioner held 15% of the stock.

The Asset Purchase Agreement was closed on May 30, 1989 (R.p. 918) with title to the assets being conveyed to petitioner and Mills, as Buyer (R.p. 916). The Closing Memorandum provided that the Seller, in lieu of compliance with the South Carolina Bulk Sales Act, would pay all creditors (other than creditors by reason of the Buyer's management of the previous dealership assets by Buyer under the Management Agreement) when due and would hold the Buyer harmless from any claim of a creditor (R.p. 920).

The action by Adams against Classic was pending at the time of the execution by petitioner of the Asset Purchase Agreement and at the time of the closing of the purchase. In June, 1989, the attorneys for Adams submitted a Pre-trial Brief in the action against Classic which stated under the heading "UNUSUAL MATTERS" as follows:

> The only unusual matter in this case involves the identity of the Defendant. Apparently, the dealership was sold, and the name was changed to Heritage Lincoln Mercury, Inc. Subsequently, the dealership was again sold to John Parker, and it is now John Parker Lincoln-Mercury, Inc. However, the Defendant made no attempt to comply with the Bulk Sales Act, and Heritage has filed an affidavit with the South Carolina Department of Highways and Public Transportation swearing that Classic and Heritage are one and the same dealership. Therefore, if the Defendant's attorney believes that his client can sit back and let Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, he may be mistaken.

(Pet.App. p. 8-11.)

The Adams' case was tried in July, 1989, and resulted in a verdict for Adams, with judgment being entered thereon against Classic on July 28, 1989, in the total amount of $716,000.50, including actual and punitive damages, attorney's fees and costs.

There was evidence in the instant case that both the judgment and the plaintiff's Pre-trial Brief in the Adams case were contained in the record of the Adams' case on file in the Office of the Clerk of Court for Charleston

County. Utilizing the Pre-trial Brief, the judgment and information obtained from the attorneys in the Adams case, respondent Jim Parker wrote the news article which is the subject of the present lawsuit (Pet.App. p. 7-1). The article described the judgment as rendered against Classic and the alleged conduct of Classic that led to the judgment as related in the Pre-trial Brief, which included Classic's use of a "straw purchase" in the sale of the car to Adams and Classic's subsequent repossession of the car in October, 1987. The article related information supplied by Classic's attorney that the case had been appealed and stated toward the end of the article:

> It's unclear who is liable in this case. Classic since has been sold, first becoming Heritage Lincoln Mercury Inc. and now John Parker Lincoln-Mercury Inc.
>
> In the brief, Buckley [Adams' attorney] argues that if the lawyer for Classic lets Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, "he may be mistaken . . . " Gowder [Classic's attorney] said since the case is on appeal, there's no reason to speculate on liability.

(Pet.App. p. 7-1.)

On August 9, 1989, Adams filed an Amended Complaint against petitioner, Mills and Parker Lincoln-Mercury, Inc., for recovery of the judgment from the assets purchased from Classic, alleging violation of the South Carolina Bulk Sales Act. That action was subsequently settled with funds paid "by or on behalf" of them (R.p. 941). The funds were apparently paid by Classic

pursuant to the indemnification clause in the Closing Memorandum.

The petitioner's Complaint in the instant case alleges that the aforesaid article stated that petitioner was possibly liable for any judgment awarded to Adams and that by the article, respondents falsely led the public and any ordinary reader to believe that John Parker Lincoln-Mercury, Inc., and specifically John Parker himself, was involved in and responsible for the unfair trade practices, fraud and consumer practices and criminal acts of Classic and the large judgment awarded to Adams (Pet.App. p. 10-2). The first of two separately stated causes of action in the Complaint is characterized "FALSE LIGHT/INVASION OF PRIVACY" (Pet.App. p. 10-4) and the second of the said causes of action is characterized "DEFAMATION" (Pet.App. p. 1-5). Petitioner sought recovery of "special, general and punitive damages" (Pet.App. p. 10-6).

Upon trial of petitioner's action, the trial judge granted respondents' motion for directed verdict as to petitioner's claim for invasion of privacy under the "false light" theory, which had not been officially recognized in South Carolina, and also under the public disclosure of private facts theory, pointing to the principle that the right of privacy does not prohibit publication of matters which are of "legitimate public concern" (R.p. 495.)

The cause of action for libel was submitted to the jury. The jury instructions placed upon petitioner the burden of proving falsity of the information and also that respondents negligently reported the false information. It was petitioner's theory of recovery that the statements

were libelous *per se*. The trial judge charged that the plaintiff was required to prove that the defendant "acted with malice" in writing and publishing the words (R.p. 773) and that a libelous *per se* statement is one in which malicious intent is presumed (R.p. 774). The jury was also instructed that implied malice would support an award of actual damages (R.p. 781) and that petitioner was required to prove actual damages (R.p. 781). The trial judge did not require proof of actual malice for recovery of actual damage proved by petitioner and did not indicate to the jury, expressly or by implication, that petitioner was a public figure.[2]

Petitioner's counsel took exception to the trial judge's failure to charge various specific requests to charge submitted by petitioner. One of those requests provided for the respondents to have the burden of proving truth. The remaining requests provided in effect for recoverability of presumed damages without including the requirement that constitutional malice be shown.

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[2] In the charge on damages, the trial judge specifically used the term "private person," saying:

> . . . a private person may recoup for defamation if he believes that the defamatory language was published and that he suffered some actual injury. He need not prove a dollar amount of damage in order to recover. A private person may also recover punitive or exemplary damages, if he proves actual malice. That is if the defendants acted with actual knowledge that the charge was false or that it was made with reckless disregard for the truth.

(R.p. 780, lines 11-18.)

The jury returned a verdict in favor of respondents. Petitioner moved for a new trial or judgment notwithstanding the verdict, which was denied by Order dated August 5, 1992 (Pet.App. p. 2-1). The Order denying petitioner's post-trial motion sets forth the petitioner's contentions with respect to the motion:

> . . . The plaintiff asserts that the court erred in requiring the plaintiff to prove that the news story was false, published with fault on the part of the defendants and caused actual injury to the plaintiff; that the invasion of privacy claim should have been for the jury, and that the jury verdict was unjust.

(Pet.App. p. 2-2.)

With respect to the libel claim, the Order continued:

> As he had at trial, plaintiff argues that the communication involving the plaintiff was not of public concern, and the controlling law is the common law of libel unmodified by the constitutional defenses recognized in cases involving communication of material in the public interest. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

(Pet.App. p. 2-2.) The trial judge concluded in the Order with respect to the libel claim:

> Utilizing the Supreme Court's broad definition of what is in the public interest, and recognizing that the story was based on information in a court file leads to the conclusion that the constitutional defenses urged by the defendants were correctly applied. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89

> L.Ed.2d 783 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

(Pet.App. p. 2-3.)

With respect to the invasion of privacy claim, the trial judge concluded in the aforesaid Order that none of the evidence offered by the petitioner supported the claim that the news story publicized private affairs of no legitimate public concern (Pet.App. p. 2-4).

The South Carolina Court of Appeals affirmed the judgment of the trial court (Pet.App. pp. 1-1 through 1-14). On the appeal, petitioner challenged the jury charge on his libel claim, arguing that the trial court improperly placed on him the burden of proving falsity of the statements in the article. He contended that he was a private figure and that the subject matter of the article was of purely private concern, thus placing his libel claim outside the realm of constitutional defamation (see Pet.App. p. 1-6). In the Opinion for which review is sought by petitioner herein, the South Carolina Court of Appeals pointed out that in private figure cases involving matters of public concern, the common law presumption of falsity is invalid and the plaintiff must prove the statement was false, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The Court stated:

> . . . Therefore, as Parker [petitioner herein] conceded at oral argument, the dispositive issue here is whether the article involved a matter of public concern. If so, then Parker's claim is governed by *Hepps*, and the jury was properly charged.

(Pet.App. p. 1-7.)

In a footnote to the above-quoted statement, the Court of Appeals pointed out that whether or not petitioner was considered a public figure, his claim was subject to the requirements of *Hepps* if the challenged statements involved matters of public concern (Pet.App. p. 1-7), stating further that the Court believed, however, that by extensively advertising his return to the car business, petitioner became a public figure, at least in the limited area of his business dealings (Pet.App. p. 1-7). The Court observed that through his advertising campaign, petitioner invited the public's attention and assumed the accompanying risk of that attention and, thus, as to statements regarding petitioner's dealership, it seemed clear that petitioner was a public figure.

With respect to the libel claim, the Court of Appeals found that the entire article, including references to petitioner, involved matters of public concern and that the trial court properly placed on petitioner the burden of proving falsity (Pet.App. p. 1-9). In addition, the Court of Appeals found that upon viewing the evidence and reasonable inferences in the light most favorable to petitioner, the article was substantially true as a matter of law, which, under South Carolina law, was an absolute defense that mooted all jury charge questions and was a reason for affirmance of the defense verdict (Pet.App. pp. 1-9, 1-10).

Because the Court of Appeals found that the article involved matters of legitimate public concern, the Court held that petitioner's invasion of privacy claim for public disclosure of private facts failed under the South Carolina substantive law providing that a cause of action for public disclosure lies only for disclosure of private facts

which are of no legitimate public concern. The Court noted petitioner's acknowledgement at oral argument that if the statements in the article were of legitimate concern to the public, both his libel and invasion of privacy challenges would fail (Pet.App. p. 1-11).

The Court of Appeals found that petitioner's argument regarding false light was "so conclusory as to be an abandonment of the issue" and therefore determined that it would not consider whether the tort of false light exists in South Carolina (Pet.App. p. 1-10).

The South Carolina Court of Appeals denied a petition of petitioner for rehearing on January 26, 1995, (Pet.App. p. 3-1) and the Supreme Court of South Carolina denied a petition of petitioner for a writ of certiorari on October 5, 1995 (Pet.App. p. 4-1).

REASONS FOR DENYING THE WRIT

I. The Supreme Court Has No Jurisdiction To Review This Case

The judgment of the Court below determined the case in favor of respondents with respect to both the petitioner's cause of action for invasion of privacy and the petitioner's cause of action for libel and petitioner has included in the Questions Presented for Review in the Petition a question relating to each of those causes of action.[3]

[3] Neither of the Questions Presented for Review as stated by petitioner is accurately expressed in the actual circumstances

No federal question was involved in or determined by the decision of the South Carolina Court of Appeals regarding petitioner's invasion of privacy claim so as to provide a jurisdictional basis for this Court to review the judgment with respect thereto. The affirmance of the directed verdict on the invasion of privacy cause of action was based upon state law. Although the Court of Appeals determined the question of whether the statements in the news article were matters of public concern, the determination of that question was not made with respect to the invasion of privacy claim as a First Amendment issue. The Court of Appeals determined that question in connection with the invasion of privacy claim in deciding whether the claim met the requirement of South Carolina substantive law for an invasion of privacy cause of action under the theory of public disclosure of private facts that there be "disclosure of private facts which are of no legitimate public concern," as enunciated in *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct.App. 1984) (Pet.App. p. 1-11).

There is also no jurisdictional basis for this Court to review the judgment with respect to the libel claim. Petitioner's Question Presented for Review relating to the libel claim pertains to whether the petitioner had the status of a public figure. As discussed at II, *infra*, that

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of the case and respondents have accordingly restated them in this brief in opposition in order to set forth the correct circumstances concerned. Respondents contend, however, that there is no basis for jurisdiction in this Court to review the judgment of the Court below under either version of the Questions Presented for Review.

question, although involving First Amendment considerations, was not a dispositive issue before the Court below. The dispositive issue on the libel claim was whether the news article involved matters of public concern. In contrast to the invasion of privacy claim, the public concern issue was a First Amendment issue as to the libel claim, necessary for resolution in order to determine the applicability of the requirement of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that a private figure plaintiff prove falsity of the statements in a suit for defamation. However, regardless of how the matter of petitioner's status as a public figure may be perceived and regardless of any comments or determinations made by the Court below with respect thereto, or with respect to the issue of whether the statements in the article were matters of public concern, this Court lacks jurisdiction to review the judgment as to the libel claim. Because the Court of Appeals held that the news article was substantially true as a matter of law, which was an absolute defense that mooted all jury charge questions under South Carolina law and was a reason for affirming the defense verdict under Rule 220(c), SCACR, the decision of the Court of Appeals rested on an independent and adequate state ground. It is well settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herb v. Pitcairn*, 324 U.S. 117 (1945).

II. The Statements Of The South Carolina Court Of Appeals Pertaining To Petitioner's Having The Status Of A Limited Public Figure Do Not Warrant Review By This Court.

The thrust of petitioner's argument for granting the writ is the contention that the South Carolina Court of Appeals erroneously concluded that petitioner was a public figure. The statements of the Court of Appeals relating to whether petitioner was a public figure are contained in a footnote (Pet.App. p. 1-7, fn. 3) in connection with the Court's consideration of petitioner's contention on the appeal that the trial court had erroneously placed upon him the burden of proving falsity in the jury charge on the libel claim. In the body of the Opinion, the Court of Appeals pointed out the principle established by *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that in private cases involving matters of public concern, the common law presumption of falsity is invalid and the plaintiff must prove the statement was false. The Court of Appeals then specifically stated that, therefore, the "dispositive issue" was whether the article involved a matter of public concern (Pet.App. p. 1-7). Further, in the footnote, the Court of Appeals specifically pointed out that "whether or not" petitioner was considered a public figure, his claim was subject to the requirement of *Hepps* if the challenged statements involved matters of public concern (Pet.App. p. 1-7, fn. 3). It is thus apparent that the statements of the Court of Appeals in the footnote expressing the Court's view that by extensively advertising his return to the car business, petitioner became a public figure in the limited sense of his business dealings and that petitioner was a public figure as to statements

regarding his dealership are unnecessary to the Court's decision and are *obiter dicta* in the purest form. Even if this Court has jurisdiction in this matter, the Court should not exercise its discretionary review to consider statements that were not necessary to determination of the case. The "compelling reasons" which Rule 10 of the Supreme Court Rules (Rev. 1995) now requires for grant of certiorari clearly continues to imply a reach to a problem "beyond the academic or the episodic" as stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (construing the former Rule criterion of "special and important" reasons).

Moreover, petitioner's own contentions in the case support the conclusion that petitioner was a limited public figure in the sense described by the Court of Appeals for the purposes of his libel claim. Petitioner contended that the article charged that he was involved in the conduct of Classic that led to the judgment. Petitioner publicly promoted his personal identification with the dealership, obviously seeking to establish a good business image. Under petitioner's own theory of the case, the allegedly defamatory statements were directly related to the business image petitioner sought to promote to the public. He would be regarded as a limited public figure with respect to those statements under the analysis in *Sunshine Sportswear & Elec., Inc. v. WSOC Television, Inc.* 738 F.Supp. 1499 (D.S.C. 1989), cited by the Court of Appeals, and other decisions such as *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir. 1983), *cert. denied*, 464 U.S. 830; and *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3rd Cir. 1980).

III. The South Carolina Court Of Appeals' Decision On The Merits Of The Issue Of Whether The Entire News Article Involved Matters Of Public Concern Is Sound And Does Not Call For This Court's Discretionary Review.

The conclusion of the South Carolina Court of Appeals that the entire news article, including references to the petitioner, involved matters of public concern, is eminently sound.

The question of whether speech addresses a matter of public concern for purposes of the First Amendment is "determined by [the expression's] content, form and context . . . as revealed by the whole record." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), quoting from *Connick v. Myers*, 461 U.S. 138, 147-148 (1983). The South Carolina Court of Appeals correctly followed that approach, taking into account the pertinent facts and circumstances shown by the record. The Court properly considered that the public had an interest in being informed about potential methods of collecting a judgment, particularly when the judgment resulted from unfair credit practices. The Court also properly took into account petitioner's own voluntary acts of publicly announcing his connection with the former dealership and inviting the public to conduct business with him, and the Court correctly reasoned that it was of public interest that "the new owner of the dealership, for whatever reason, might bear some responsibility for the damages in the lawsuit. . . . " (Pet.App. pp. 1-7, 1-8). As the trial judge observed in denying petitioner's motion for a new trial or judgment n.o.v.:

> . . . A determination of what is in the public interest is not to be narrowly made because the constitutional guarantee of freedom of the press allows the public to obtain information necessary on a wide range of topics "to cope with the exigencies of their period." *Thornhill v. State of Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 quoted in *Time, Inc. v. Hill*, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1967).

(Pet.App. pp. 2-2, 2-3).

It is facially apparent from the Opinion of the Court below that the Court's decision with respect to whether the entire article, including references to petitioner, involved matters of public concern, both for purposes of the libel claim and for purposes of the invasion of privacy claim, is a proper application of applicable law to the evidence and that the decision does not warrant further consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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